IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 42

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC.,
Petitioners,

v.

UNITED STATES OF AMERICA, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

I.

THE PUBLICATIONS AT ISSUE HAVE REDEEMING SOCIAL IMPORTANCE

There is no significant difference between petitioners' and respondent's views of the proper standard for determining obscenity. The Government agrees that "obscene" publications have three characteristics. Their "dominant theme and appeal [is to] a morbid and shameful preoccupation with sex, as opposed to a healthy sexual interest" (Res. Br. 18-19; cf. Pet. Br. 35); their prurient themes are expressed in a manner which "goes substantially beyond national standards of permissible candor" (Res Br. 20; cf. Pet. Br. 33-

34); and they are "without redeeming social importance" (Res. Br. 11, 21; cf. Pet. Br. 29-33).[1]

The United States does not now dispute petitioners' showing that each of the publications at issue has redeeming social importance, and declines to defend the conclusions of the courts below that these publications have no value for society.[2] Since it agrees that a work possessing redeeming social importance cannot be obscene, the Government's present position should compel reversal.

The Government argues, however, that the convictions for mailing Eros and Liaison can be sustained if the Court will exclude from consideration those parts which are admittedly of value and examine other portions as if each such portion was an independent work separately charged to be obscene. But breaking Eros and Liaison into parts is foreclosed by the Government's stipulation that "[t]he Indictment charges that [each of] the alleged non-mailable [publications] * * * is obscene when considered as a whole" (R. 149).[3]

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[1] As to the last of these elements, the Government asserts that the redeeming social importance of a work cannot be established by merely "a single well-turned phrase", "a sentence or two of social comment" or "a particular photograph or drawing of some artistic merit" (Res. Br. 22), but does not argue that the claims of redeeming social importance of the publications at issue are predicated upon so slender a base. Therefore, even if the term "utterly without redeeming social importance" admits of a *de minimis* exclusion, it would have no bearing on the outcome of this case.

[2] Eros (Res. Br. 27, 34); The Housewife's Handbook on Selective Promiscuity (Res. Br. 27, 33-34); Liaison (Res. Br. 30).

[3] The stipulation was furnished in lieu of a bill of particulars, petitioners having asked the United States, *inter alia*, to "state whether it is charged that the non-mailable material referred to in [the various counts] of the indictment are obscene when considered as a whole, or whether a part or parts thereof are obscene." The Government had also been asked: "If it is charged that a part or parts thereof are obscene, [to] set forth an exact copy of said part or parts."

It may be theoretically possible to focus upon portions of a non-integrated work when examining for prurient interest appeal or patent offensiveness,[4] but unless it is charged that a particular article is obscene when considered as a separate entity, the redeeming social importance present in the whole work cannot be disregarded. In other words, the absence of redeeming social importance of some part of a work cannot negate the redeeming social importance which the whole derives from other parts.

Moreover, it was against the charge that Eros and Liaison were obscene "when considered as a whole" that petitioners defended. The Government did not single out or offer proof as to any particular portion of these publications nor did defendants try to establish the redeeming social importance of each and every article as an independent work.[5] The trial judge convicted petitioners because, viewing Eros and Liaison as a whole, he found that neither had "the slightest redeeming social, artistic or literary importance or value" (R. 352-353). These convictions cannot be sustained on appeal in reliance on a charge not made, not proved, not defended, and not found. *Cole* v. *Arkansas,* 333 U.S. 196 (1948).

The Government does not even try to argue that the Handbook should be examined by parts rather than as

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[4] It is doubtful whether Eros could be classified as a non-integrated work. The trial court used the word "integrated" in describing Eros (R. 365), and dealt with it as a highly integrated work (R. 362-363).

[5] One of the Eros articles to which the Government refers, an expurgated condensation of the first volume of Frank Harris' "My Life and Loves" was not even mentioned during the trial. The other articles (with the exception of the photographic essay "Black & White in Color") were referred to only in passing.

a whole.[6] Instead it seeks to sustain conviction on the Handbook counts by adding a new qualification to the concept of redeeming social importance, contending that the failure of the record to show that its distribution "by petitioners was limited to those who would use it in a clinical, educational or professional manner * * * provide[s] a basis for a * * * finding of lack of redeeming importance" (Res. Br. 33).

When in *Roth* this Court opened the door of constitutional protection of speech and press "only the slightest crack" to permit the exclusion from the mails of worthless garbage,[7] surely it did not invite the exclusion of that which would be of value to some but not all. The suggestion that Government may establish occupational and educational qualifications and deny the right to read to those who do not qualify, raises constitutional questions of the utmost gravity. Cf. *Lamont* v. *Postmaster General,* 381 U.S. 301, 307 (1965); *Martin* v. *City of Struthers,* 319 U.S. 141, 143 (1943); *Meyer* v. *Nebraska,* 262 U.S. 390 (1923).

But even assuming that a statute, which made the redeeming importance of a work turn upon the professional or educational level of its readers, would not offend the Constitution, 18 U.S.C. § 1461 is not such a

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[6] A self-limitation not observed by the Citizens for Decent Literature whose *amicus* brief concludes with twenty-four pages of excerpts from the Handbook, presumably offered to assist the Court should it decide to return to the rule of *Regina* v. *Hicklin,* L.R. 3 Q.B. 360 (1868).

[7] In *Kingsley Books* v. *Brown,* 354 U.S. 436, 440-441 (1957), which adopted the *Roth* definition of obscenity, it was held that obscene material may be seized and destroyed. Once material is destroyed, how can the class to which (under the Government's hypothesis) distribution of a book would be constitutionally protected ever receive it?

statute.[8] The statute under which petitioners were tried and convicted makes it a crime to "knowingly deposit for mail or delivery, anything declared by this section to be nonmailable." Far from depending upon the identity or characteristics of the addressee, the offense is complete even if the material is never delivered. It is entirely understandable therefore that the Government at trial offered no evidence to establish the identity or profession of the persons to whom petitioners mailed the Handbook.[9]

Finally, the Handbook's values do not exist only for the specialist. As a true account of the author's sexual experiences and attitudes, it provides information and develops insights which should not be the exclusive possession of the psychiatrist, and its value in relieving sexual guilt brought about by ignorance and misapprehension cannot be realized if it is confined to the shelves of the physician. Above all, the Handbook's advocacy of change in laws and attitudes on sexual matters may not be partially suppressed by limiting those whom the author is permitted to persuade.

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[8] For an example of such a statute and a demonstration of the dangers of classification see Ohio Revised Code, § 2905.37 quoted in *Mapp* v. *Ohio*, 367 U.S. 643, 675, ftn. 7 (1961) (dissenting opinion).

[9] Contrary to the Government's assertion, the record does not "suggest that petitioners attempted to place [the Handbook] in general circulation among many persons to whom its asserted values would have been minimal" (Res. Br. 33). The only testimony with respect to petitioners' distribution of the Handbook shows that Documentary Books, Inc. mailed 5,543 copies of the Handbook (R. 162) as contrasted with the more than 6,000,000 pieces of mail sent out by Eros Magazine, Inc. (R. 161).

II.

EVEN IF THE PUBLICATIONS' REDEEMING SOCIAL IMPORTANCE IS DISREGARDED, PETITIONERS' CONVICTIONS CANNOT BE SUSTAINED

Attempting to prop up the conviction on the Liaison counts, the United States suggests that if Liaison is not "obscene", it is at least vulgar and filthy and thus within the statute (Res. Br. 14, 30). But the issue as to whether Liaison is "filthy" is not open in this proceeding. Before trial, the Government stipulated that "The *Indictment* charges that * * * 'Liaison' * * * is *obscene* when considered as a whole" (R. 149) (Emphasis added).

Seeking to avoid the effect of its pre-trial stipulation, the Government asserts that the "concept of obscenity" under 18 U.S.C. § 1461 includes the "vulgar and filthy" (Res. Br. 14, 29-30). The precise opposite is the law. *Swearingen* v. *United States,* 161 U.S. 446 (1896), squarely held that "coarse and vulgar" material is not "obscene".[10] *United States* v. *Limehouse,* 285 U.S. 424 (1932), on which the Government relies, did not overrule *Swearingen,* it sustained an indictment for mailing filthy material on the ground that Congress had added the "filthy" as a new and additional class of unmailable material (285 U.S. at 426-427). The proposition that "filthy" and "obscene" are separate and different categories is so well established that in *Sinclair* v. *United States,* 338 U.S. 908 (1950), it was sufficient for this Court to merely cite *Swearingen* and *Limehouse* to show that the petitioner could not be convicted for mailing a "filthy" letter when the indictment charged that he had mailed an "obscene, lewd and lascivious letter".

[10] The classification "obscene" pertains to "lewd" and "lascivious" matter having a "tendency calculated to corrupt and debauch the minds and morals of those into whose hands it might fall." *Swearingen* v. *United States,* 161 U.S. at 451.

Petitioners relied on the Government's stipulation that Liaison was charged with being "obscene" and defended against that charge. The trial court found petitioners quilty on that charge (R. 356, 360, 361, 368), and the court below affirmed on that basis (R. 385, 391). An affirmance in this Court based upon the different offense of mailing "filthy" matter would be a "sheer denial of due process". *De Jonge* v. *Oregon,* 299 U.S. 353, 362 (1937); *Cole* v. *Arkansas,* 336 U.S. 196 (1948).

All that remains is the Government's argument that findings of prurient interest appeal and patent offensiveness "might appropriately be left to the reasonably based judgments of the lower courts" (Res. Br. 27-28) and, therefore, it is unnecessary for this Court to exercise an independent judgment on these matters with regard to the publications at issue. Although the suggestion might have a certain appeal, it loses sight of the fact that *Roth* held that obscenity, as therein defined, was a special classification historically excluded from constitutional protection. This being so, ascertainment of all the factors which identify obscenity—prurient appeal and patent offensiveness as well as lack of redeeming social importance—involves a matter of constitutional classification which this Court will not leave to the judgments of others.[11]

Even if this were not so, before this Court abdicates the function of determining prurient interest appeal

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[11] Plenary review is all the more required since the terms, prurient interest appeal and patent offensiveness, leave so much room for subjective application. Respondent admits that judgments as to these factors are made "somewhat subjectively" (Res. Br. 28), but inexplicably concludes that this argues against disturbing convictions by too searching an examination of the premises upon which they were based.

and patent offensiveness, it must be absolutely certain that the courts below found these factors to be present and that the process by which such findings were made assures their accuracy. In this case, neither condition is satisfied.

The Government concedes that the trial court never found Eros to be patently offensive[12] and must resort to inference to supply the finding that Liaison has prurient interest appeal (Res. Br. 22-23, ftn. 6). If any importance is to attributed to the trial court's findings, direction of judgments of acquittal on the Eros and Liaison counts would be required (see Pet. Br. 57-58). Certainly they do not support the judgments of conviction.

Independent and apart from what the trial court's findings do or do not say, is the fact that they were made in gross disregard of the requirements of Rule 23(c), Federal Rules of Criminal Procedure, and even the most elemental concepts of due process. The Government is obviously unwilling to defend the manner in which these findings were made. It stops short with a statement that the Rule "does not require the special findings to be made before or simultaneously with the general finding" (Res. Br. 36) and does not even deal with the fact that the post verdict findings, ostensibly in support of the general verdict, were prepared by the prosecutor and submitted to the trial judge *ex parte*. In our brief at pp. 61-66 we present the trial court's failure to comply with Rule 23(c) as an independent

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[12] The court below said that the missing finding as to Eros can be inferred from the trial court's other Eros findings (R. 391). The Government, unable to explain how, suggests that we look at the trial court's opinion, handed down over three months after the findings, and *infer* the missing finding from the opinion (Res. Br. 23, ftn. 6).

ground for reversal. Here we confine ourselves to arguing that findings made in this manner are entitled to no deference whatever. *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964).

It is manifest that when the trial judge pronounced petitioners guilty, he was giving voice to a gestalt reaction to the publications at issue which had little or nothing to do with the standards enunciated by this Court. Everything in the record is consistent with this view. First, the trial judge denied the motion to dismiss the indictment because he considered the works to be *prima facie* obscene, a judgment he was prepared to make after having read only parts of them (R. 300, 358). Next, he interrogated defense witnesses on whether the Handbook advocated the practice of adultery and sexual acts which the law classifies as sodomy (R. 270, 272, 296, 297-298, 307, 309-311) and inquired whether teenagers would be led into sexual misconduct were they to read the book (R. 271-273, 296-298, 300-301, 304). He allowed the Government's rebuttal witness to testify at length as to the Handbook's assumed effect on adolescents (R. 321-324). Finally, he rejected or ignored all of the evidence that was inconsistent with his evaluation of the publications as "obscene"[13] for no express or apparent reason other than his disagreement with the conclusion to which that evidence would lead.

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[13] The Government is wrong when it says that the trial judge "rejected" the testimony of all defense witnesses (Res. Br. 24). With the exception of opinion testimony bearing upon the redeeming social importance of the Handbook, the court did not reject the evidence offered by the defense, it just pretended that this evidence did not exist. Petitioners have never claimed that expert testimony can "conclusively" establish that a work has redeeming social importance, does not go substantially beyond contemporary limits of candor, or does not have the requisite prurient interest appeal, but evidence bearing upon these questions cannot be arbitrarily disregarded.

At the time the trial judge found petitioners guilty he made no findings which would reveal the facts and standards he had in mind. The so-called "Special Findings of Fact", put into his hands by the prosecutor and proclaimed long after the verdict, were not findings, but incantations.

We believe the real reason for the suggestion that this Court should rest its judgment on such findings is that it enables the Government to avoid all discussion of whether those findings were correct in the light of the evidence. Its reluctance to engage in such discussion is understandable, for the evidence does not prove that which the Government had the burden of proving. Rather, as we have shown, the evidence in this case clearly establishes that the publications at issue do not make their predominant appeal to prurient interest and do not go substantially beyond that which society now tolerates in discussions of sex. (Pet. Br. 33-37; 43-45; 52-53, 55-56). Since the Government does not argue to the contrary, petitioners need say no more.

Respectfully submitted,

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